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No. 88-635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DEMACO CORPORATION,
PAVER SYSTEMS, INC.,
COASTAL CONTRACTING CORPORATION and
R.I. LAMPUS COMPANY,
Petitioners,

- v. -

F. VON LANGSDORFF LICENSING LIMITED and
F. VON LANGSDORFF BAUVERFAHREN GmbH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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Respondents.[1]

BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

The petition for Supreme Court review of this case presents no special

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[1]The respondents are corporations owned by inventor Fritz von Langsdorff. They have no parent companies, subsidiaries, or affiliates.

and important reasons for review (Rule 17.1). Its statement of questions, contrary to Rules 21.1(a) and 21.5, is argumentative, presumptuous, inaccurate, and misleading.

Taken even at face value, the petition is based on factual assertions relating to this one case only and the particular patent involved in it.[2] No question of law having any cognizable or general applicability to industry or the public interest is presented in either the statement of questions or the petitioners' argument.

1. Petitioners'Statement of Questions

Petitioners' Question 1 presumptuously and incorrectly assumes that the Court of Appeals for the Federal Circuit (the Court) "eliminate[d] 35 U.S.C. §103

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[2]Barth and von Langsdorff U. S. patent No. 4,128,357 ("Barth patent" SA 9-36).

from the patent statutes" by upholding the respondents' patent.[3] Petitioners' Question 2 presumptuously and incorrectly assumes that the Court's holding is represented by their counsel's comparison of something pictured in his own drawing, which is not evidence of record, with something else pictured in a second such drawing, and thus was a failure "to apply the mandates of this Court in respect of 35 U.S.C. § 103."

Petitioners' Question 1 further assumes, plainly contrary to the Court's

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[3]The petitioners here, after admittedly copying the patented invention (see A 39), have kept the widely licensed Barth patent under attack in burdensome litigation for many years. An earlier related litigation that they supported (see A 48- 49), F. von Langsdorff Licensing Limited et al v. Paver Lock, Inc. et al, Case No. 82-8120 in the Southern District of Florida, resulted on January 25, 1985, in a Judgment with Injunction holding this patent valid, enforceable, and willfully infringed.

opinion and the record, that the Barth patent was granted and upheld "on a paving stone...clearly suggested by the prior art"; and also, again contrary to the Court's opinion, that the Court upheld the patent "merely because that paving stone may have enjoyed commercial success."

2. Petitioners' Statement of the Case

This section of the petition states nothing about the teaching and claims of the Barth patent, nothing about the prior art, and nothing about the differences between the patented invention and the prior art.

While admitting widespread manufacture and sale of "[t]he paving stone covered by the Barth patent" (p. 6), petitioners on pages 6-7 misleadingly describe the origination of this suit,

and pretend that a former fellow infringer, Krehling Industries, Inc., settled for its infringement because of "lack of importance of the product." If the patented product has so lacked importance, it is strange indeed that the petitioners first copied the patent (A 39) and then burdened the patentee and several federal courts for many years, and now would burden this Court, with their attempts to destroy the patent.

The reasons stated in the Federal Circuit Court's opinion for the reversal of the district court's judgment are ignored throughout the petition, with the exception only of a distortion on page 11 of the Court's holding regarding commercial success and a passing acknowledgment on page 17 of a holding by the Court that the patented invention provided "certain desirable benefits (the

paving stone has the same pleasing appearance when laid in different laying patterns)."

That acknowledgment is highly significant. Yet the Court's holdings involved in it are totally ignored in petitioners' statement of questions, their statement of the case, and their argument that the Court's decision conflicts with decisions of this Court and "has eroded" or "effectively removed" the "obviousness section of the patent statutes."

3. Petitioners' Argument

Contrary to petitioners' assertions, the Court of Appeals extensively considered the §103 obviousness issue in its opinion (A 5-29, SA 1), with full regard for the record, the district court's findings, and the applicable law

including this Court's guidepost instructions in Graham v. John Deere Co., 383 U.S. 1 (1966).

Contrary to petitioners's assertion in Question 1, the Barth patent is not "on a paving stone which is clearly suggested by the prior art." Nor is either the patented paving stone or any prior art correctly represented by the drawings (mere counsel arguments) which are asserted in Question 2 and on argument page 14.

The patented paving stone is correctly illustrated in the Court's opinion (SA 1) and in Figs. 15-16 of the Barth patent drawings (SA 22).

The drawing represented by petitioners (p. 14) as showing "a paving stone" shown in a "German newspaper photograph" (SA 37, Plaintiff's Exhibit 13) is neither an exhibit of record nor

warranted by any finding below. Petitioners asserted a 1974 German newspaper publication as prior art. The photograph is not that publication. The evidence of that publication -- a reproduction of a microfiche record of the published newspaper page (Plaintiff's Exhibit 11 at trial) -- is omitted from the petition. The only relevant holding of the district court reads (S 65):

> The prior art also teaches a design having the overall surface appearance of a Barth paver, without a dummy groove, being incorporated into an outdoor ground covering as shown by a microfiche reproduction of a 1974 West German newspaper account of the opening of the Muenster Zoo.

There never has been any holding below that the German newspaper publication disclosed or taught the public anything about a paving stone.

Petitioners totally ignore the patent claim limitations (A 3-4) to

certain dimensional relationships of ten end and side faces and the dummy joint groove, with related center-symmetrical topside head and stem configurations, in each paving stone of the claims. They ignore the Court's related holding (A 9) that "[t]he claimed relative dimensions are not shown in the prior art."

Petitioners also ignore the Court's analysis (A 5-13) of the Barth invention, the combination of properties that it provided, and its relation to the prior art.

The Court's opinion points out (A 5), without challenge in the petition, that the paving stones of the Barth patent claims achieved a result in use, called "the Barth result," of "combining the feature of structural strength obtained from an elongated interlocking paver with the feature whereby, however

the asymmetric stone is laid, the effect is the same symmetric pattern."

Further, the petition fails to mention the Court's important observations (A 8-9) that:

- The art does not show or suggest "this symmetrical paving stone pattern giving the appearance of two different stones" (A 9).
- "Nor does the prior art describe or suggest a stone that gives to paving the structural strength obtained here while achieving a harmonious appearance whatever the pattern in which the stones are laid" (A 9).
- "It was not disputed that the Barth stone possessed a combination of advantages not obtained with prior pavers" (A 11-12).

This new combination of advantages, which as well is a new combination

of properties and a new result in the plural paving stones and the pavement structure claimed in the patent, includes, as acknowledged by infringer-petitioner Paver Systems in its testimony quoted by the Court (A 12-13), the layability of the stones in a herringbone bond pattern important to the strength of the pavement under traffic load, and in a variety of other bonds as well, with achievement of the same appearance pattern in the pavement no matter in which orientations the stones are laid.

Most significantly, petitioners ignore the Court's pervasive conclusion (A 13):

> "We conclude that the district court clearly erred in its analysis of the differences between the Barth paver and the prior art."

That holding plainly belies

petitioners' asserted questions and their argument that the Court's decision is in direct conflict with this Court's rulings in the Graham case and related cases. One of the prime requisites for a determination under §103, as stated in Graham, 383 U.S. at 17-18, is that "differences between the prior art and the claims at issue are to be ascertained."

That holding also belies petitioners' assumption that the Court upheld the patent "merely because" the paving stone invention "is novel" and "may have enjoyed commercial success" (Question 1; Petition p. 9).

Petitioners assert (p. 11) that the Court acted "without holding the District Court's findings on commercial success clearly erroneous." Plainly to the contrary, the district court itself

found commercial success to be a fact of the case (A 71), and the Court of Appeals held (A 29) that the District Court "clearly erred" in finding no proof of a "nexus between the Langsdorff patented invention and its commercial success."

Petitioners not only have distorted the case by presumptuous, misleading and untrue arguments. They ignore the fact that the Court's holding regarding commercial success was but one of several factors which required reversal of the district court's judgment. The fundamental basis for the reversal is that the petitioners had failed to carry their burden of establishing invalidity of the Barth patent.[4] The Court's opinion points out:

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[4]35 U.S.C. § 282: Presumption of validity; defenses

(Continued)

> Viewing all the factors pertinent to determination of obviousness, applying the guidelines of Graham v. Deere, leads us to conclude that the presumption of validity had not been overcome by clear and convincing evidence (A 29).

It is manifest from the opinion of the Court of Appeals for the Federal Circuit, and from the record as well, that the decision below is in full accord with the decisions of this Court in cases involving issues of obviousness under 35 U.S.C. § 103. The paving stones invention of the Barth patent, unlike the invention at issue in Sakriada v. Ag Pro, Inc., 425 U.S. 273, 282-283 (1976), did indeed produce a "new or different function." This invention, unlike the invention at issue in Anderson's Black

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[4] (Continued)

> A patent shall be presumed valid.* * * The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity. * * *

Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57, 63 (1969), did indeed provide "more than" a mere "successful venture." Petitioners backhandedly admit as much by their acknowledgment (p. 17) that the Barth patented invention provided "certain desirable benefits" in that "the paving stone has the same pleasing appearance when laid in different laying patterns."

CONCLUSION

The petition of patent infringers Demaco Corporation et al for a writ of certiorari to the United States

Court of Appeals for the Federal Circuit is clearly without merit. It should be denied forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI has been served upon Russell D. Orkin, Esq., counsel of record for petitioners, by mailing three copies thereof by First Class Mail, postage prepaid, in an envelope addressed as follows:

Russell D. Orkin, Esq.
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this 19th day of October, 1988.

Albert C. Johnston

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